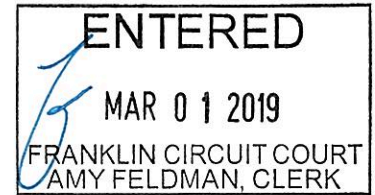


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II

CIVIL ACTION No. 19-CI-00087



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE SECRETARY OF STATE, ex rel.  
ALISON LUNDERGAN GRIMES, in her official  
capacity as Secretary of State of the  
Commonwealth of Kentucky

PLAINTIFF

vs.

JARED DEARING

and

JENNIFER SCUTCHFIELD

DEFENDANTS

**ORDER**

This matter is before the Court upon Defendants' *Motion to Dismiss* and Plaintiff's *Motion for Early Hearing*. This matter was called before the Court during the Court's regular civil motion hour on Wednesday February 27, 2019. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Defendants' *Motion to Dismiss* and **DENIES** Plaintiff's *Motion for Early Hearing*.

**STATEMENT OF FACTS**

On January 24, 2019, Plaintiff, Commonwealth of Kentucky Office of the Secretary of State, ex rel. Alison Lundergan Grimes, in her official capacity as Secretary of State of the Commonwealth of Kentucky ("Secretary Grimes"), filed her complaint for a declaration of rights pursuant to KRS Chapter 418 seeking a declaration from this Court that as the Secretary of State of the Commonwealth of Kentucky, the Commonwealth's

Chief Election Official, and the Chair of the State Board of Elections (“SBE”), she is entitled, as a matter of law, to access the Voter Registration System (“the VRS”) and maintain a read only copy of the VRS in the performance of her official duties. Defendant Jared Dearing (“Dearing”) serves as the Executive Director of the SBE and Defendant Jennifer Scutchfield (“Scutchfield,” and together with Dearing, “Defendants”) is a licensed attorney and is employed as the Assistant to the Director of the SBE. The SBE is the statutorily created body authorized under KRS 117.015 to “administer the election laws of the state and supervise registration and purgation of voters within the state.” KRS § 117.015(1).

On August 27, 2018, Dearing sent a letter to the SBE, in which Scutchfield concurred, expressing Defendants’ concerns that Secretary Grimes and her staff were improperly accessing the VRS. *See* Plaintiff’s Complaint Exhibit 1. Secretary Grimes disagreed with Defendants’ stance of her access to the VRS, and despite the concerns raised by Defendants, the SBE agreed with Secretary Grimes’ position. To best affirm the SBE’s position, it unanimously adopted a *Resolution Affirming Kentucky State Board of Elections Staffing and Oversight* (“the Resolution”) on August 28, 2018, confirming Secretary Grimes’ right to access the VRS as Secretary of State of the Commonwealth of Kentucky, the Commonwealth’s Chief Election Official, and the Chair of the SBE.

In her Complaint, Secretary Grimes alleges that a declaration by this Court affirming her access to the VRS is necessary because Defendants’ opinions about her access to the VRS have caused confusion and “disharmony” among her office and the SBE. On February 18, 2019, Defendants moved to dismiss this matter reasoning that no actual case or controversy exists to invoke this Court’s jurisdiction, and even if an actual case or

controversy exists, Defendants' opinions of Secretary Grimes' access to the VRS are protected via their First Amendment right of freedom of expression. Secretary Grimes objects to Defendants' *Motion to Dismiss* and argues that an actual, justiciable controversy exists as the opinions of Defendants are contrary to federal and state law, which is causing Secretary Grimes harm in fulfilling the statutorily imposed duties of her office. Additionally, Secretary Grimes asks the Court to impose an expedited hearing and briefing schedule on this matter.

### STANDARD OF REVIEW

Under Kentucky law, when a court considers a motion to dismiss under Civil Rule 12.02, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) *citing* *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) *quoting* *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. Ct. App. 2002). In *D.F. Bailey, Inc. v. GRW Engineers Inc.*, 350 S.W.3d 818 (Ky. Ct. App. 2011), the Kentucky Court of Appeals discussed a trial court's standard of review when ruling on a motion to dismiss. "[T]he question is purely a matter of law. [...] Further, it is true that in reviewing a motion to dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision. *Id.* at 820 (internal citations omitted).

"When a motion to dismiss a complaint seeking a declaration of rights has been made, the question presented to the court is not whether the plaintiff will ultimately prevail.

Rather, such a motion challenges the sufficiency of the complaint, and the court is called on to determine whether the complaint states a cause of action for declaratory relief. In ruling on a motion to dismiss, it is improper for the court to consider whether the plaintiff will ultimately prevail.” *Bank One Kentucky NA v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 278 (Ky. Ct. App. 1997).

## ANALYSIS

### I. Defendants’ *Motion to Dismiss*

Before the Court can address Secretary Grimes’ request for an expedited hearing and briefing schedule for this matter, the Court must first determine whether an actual case or controversy exists to invoke this Court’s jurisdiction to issue a declaration. *See* KRS § 418.040. Circuit Courts, courts of general jurisdiction, are granted jurisdiction “only of ‘justiciable causes.’” *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, 423 S.W.3d 726, 733 (Ky. 2014); *see also* KY. CONST. § 112(5). “[T]he existence of a justiciable controversy...is a prerequisite to declaratory relief” under KRS Chapter 418.” *Id.* “An actual controversy for purposes of the declaratory judgment statute requires a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion.” *Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2010) (quoting *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991) (citing *Draco v. Liberty Nat’l Bank & Trust Co.*, 267 S.W.2d 95 (Ky. 1954))).

Defendants offer that Secretary Grimes’ Complaint does not seek to resolve a current controversy between the parties because Secretary Grimes’ Complaint merely reiterates the disagreement of opinions held by the parties about Secretary Grimes’ access

to the VRS. In her Complaint, Secretary Grimes does not allege that Defendants are actually interfering with her access to the VRS. Instead, Secretary Grimes takes issue with the August 27, 2018, letter in which Defendants expressed their opinion of Secretary Grimes' use of the VRS. Defendants also correctly highlight that they do not have the authority to restrict Secretary Grimes' access to the VRS, thus if this Court made the declaration sought by Secretary Grimes it would have no effect on Defendants. The authority to restrict Secretary Grimes' access rests with the SBE and the General Assembly. The SBE has made clear, through its August 28, 2018, Resolution, that Secretary Grimes, in her official capacity, may access the VRS.

Upon review of the pleadings, it is evident to the Court that nothing more than a mere difference of opinion exists between the parties, which does not give rise to an actual case or controversy to invoke this Court's jurisdiction. It is well settled that "[e]very dispute between lawyers on a subject of law, whether adjective or substantive, is not a justiciable controversy to be settled in a declaratory action. 'A mere difference of opinion is not an actual controversy,' within the contemplation of our statute." *Jefferson County ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 605 (Ky. 1930) (citing *Axton v. Goodman*, 265 S.W. 806, 807 (Ky. 1924)). The Court is not entitled to make declarations through KRS Chapter 418 to weigh the credibility of varying personal opinions. A difference of opinion concerning Secretary Grimes' access of the VRS is not a real controversy and a declaration by this Court would serve as nothing but an advisory opinion to "satisfy the curiosity of the parties." *Bank One Kentucky NA*, 957 S.W.2d at 279. *See also Commonwealth v. Crow*, 92 S.W.2d 330, 332 (Ky. 1936) (quoting *Oldham County v. Arvin*, 52 S.W.2d 657, 658-59

(Ky. 1932)) (“[C]ourts will not take jurisdiction” over “abstract legal questions designed merely to furnish information to the inquirer.”).

“A declaratory judgment should not or cannot be made as to questions which may never arise or which will not be decisive of any present or are academic, hypothetical, incidental, or remote, or which will not be decisive of any present controversy...The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities.” *Draco*, 267 S.W.2d at 97. Secretary Grimes’ Complaint does not assert that Defendants are interfering with Secretary Grimes’ right to access the VRS; rather the Complaint only shows that Defendants maintain a different opinion than Secretary Grimes about her access to the VRS. “To render the controversy...justiciable[,] plaintiff should aver [its] legal rights in the premises with imposed duties which if exercised would impair, thwart, obstruct or defeat plaintiff in [its] legal rights.” *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926). Despite Secretary Grimes’ belief that a declaration is necessary for her ability to carry out her official duties, Secretary Grimes has not averred an interference with her ability to access the VRS by Defendants. She merely states that Defendants’ opinions have created confusion and disharmony, which is directly refuted by her continued ability to access the VRS. Absent an interference with Secretary Grimes’ access to the VRS, this mere difference of opinion cannot rise to the level of a justiciable controversy. Further, it is unknown if the declaration Secretary Grimes seeks will ever ripen for the Court to appropriately render judgment, but the Court cannot and will not improperly assume jurisdiction and make a declaration on what can only be viewed as an academic dispute of opinions. *See Draco*, 267 S.W.2d at 97.



Moreover, this Court is not in the position to issue an advisory opinion, nor is a declaratory action the appropriate remedy for Secretary Grimes' dispute with Defendants' opinions on her access to the VRS. *Med. Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008) ("Unless there is 'an actual case or controversy,' this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions."). A plain reading of Secretary Grimes' Complaint demonstrates that this matter stems entirely from Dearing's August 27, 2018, letter to the SBE, in which Scutchfield agreed, where Defendants alleged that Secretary Grimes and her staff were improperly accessing the VRS. After receiving Defendants' concerns of Secretary Grimes' access to the VRS, the SBE entered the August 28, 2018, Resolution affirming Secretary Grimes' access to the VRS, ultimately settling this dispute.

Following entry of the Resolution by the SBE, to the Court, a present finding that an actual case or controversy exists would be absurd because it has been made clear that through her position as Secretary of State of the Commonwealth of Kentucky, the Commonwealth's Chief Election Official, and the Chair of the SBE, that Secretary Grimes' access to the VRS is not only necessary but statutorily permitted. "What makes a declaratory judgment action a proper judicial resolution of a case or controversy, rather than an advisory opinion, is the settling of some dispute which affects the behavior of the defendant toward the plaintiff." 26 C.J.S. *Declaratory Judgments* § 32. Although Secretary Grimes contends that a declaration by this Court would terminate the differing opinions held by her and Defendants concerning her access to the VRS, the Court finds that such a declaration is not necessary to cease the differing beliefs because the SBE, the body tasked with "administer[ing] the election laws of the state and supervis[ing] registration and

purgation of voters within the state,” has decreed that Secretary Grimes may access the VRS. KRS § 117.015(1). Because only the SBE or the General Assembly can alter Secretary Grimes’ access to the VRS, a declaration by this Court about Defendants’ personal opinions on the matter would have no legal impact. Accordingly, the Court agrees with Defendants that Secretary Grimes’ Complaint seeks an advisory opinion about a mere difference of opinion between the parties, which does not invoke this Court’s jurisdiction to issue a declaration about her access to the VRS.

Next, Defendants reason that if the Court finds that a justiciable controversy between the parties exists, that the Court should exercise its discretion under KRS 418.065 and dismiss Secretary Grimes’ Complaint because a declaration by this Court “would not terminate the uncertainty or controversy which gave rise to [this] action.” KRS § 418.065. Since the Court finds that Secretary Grimes’ Complaint fails to give rise to an actual case or controversy for which this Court can make a declaration, the Court does not need to consider dismissal of this matter under KRS 418.065.

Finally, Defendants assert that the First Amendment protects Defendants’ opinions on Secretary Grimes accessing the VRS. Defendants believe that a contrary finding would serve as a direct infringement on their constitutional right to freedom of expression. Because the Court finds that no justiciable case or controversy exists to invoke this Court’s jurisdiction to make such a declaration, the Court will not address this argument by Defendants, and merely makes mention of the argument to preserve the issue.

## **II. Plaintiff’s *Motion for Early Hearing***

Secretary Grimes tendered a *Motion for Early Hearing* pursuant to KRS 418.050, which provides, “[a]ny action in which a declaration of rights or determination of questions



of construction is the relief asked, may be docketed for early hearing as in the case of a motion.” KRS § 418.050. Secretary Grimes believes that an early hearing is necessary because the question at issue is time-sensitive in order for her to best perform the duties of her elected office. It is the Court’s finding that Secretary Grimes’ Complaint does not give rise to a justiciable case or controversy, therefore Secretary Grimes’ motion is unnecessary and, as a result, is denied.

### CONCLUSION

**WHEREFORE**, the Court finds that Secretary Grimes has failed to plead an actual case or controversy to invoke this Court’s jurisdiction to issue a declaration pursuant to KRS Chapter 418. Because advisory opinions are prohibited under KRS Chapter 418, a declaratory action is not the appropriate remedy to rectify the mere difference of opinion held by Secretary Grimes and Defendants over Secretary Grimes’ access to the VRS. Accordingly, the Court agrees with Defendants that Secretary Grimes’ Complaint must be **DISMISSED** pursuant to CR 12.02, and thus, the Court **GRANTS** Defendants’ *Motion to Dismiss*. As the Court finds that this matter should be dismissed, Secretary Grimes’ *Motion for Early Hearing* is **DENIED**.

This order is final and appealable and there is no just cause for delay.

**SO ORDERED**, this 1<sup>st</sup> day of March, 2019.

  
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**THOMAS D. WINGATE**  
Judge, Franklin Circuit Court

**CERTIFICATE OF SERVICE**

1st I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of March, 2019, to the following:

**Hon. Carmine G. Iaccarino**

**Hon. Jared L. Downs**

**Hon. Heather L. Becker**

Public Protection Cabinet

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Amy Feldman, Franklin County Circuit Court Clerk